

No. 75-1495

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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

Supreme Court, U. S.

FILED

APR 15 1976

THOMAS A. KLEPPE, SECRETARY OF THE INTERIOR,  
ET AL., APPELLANTS

MICHAEL RODAK, JR., CLERK

v.

WANDA JUNE WEEKS, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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**JURISDICTIONAL STATEMENT**

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## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Constitutional and statutory provisions involved .....	2
Statement .....	2
The question is substantial .....	7
Conclusion .....	12
Appendix .....	1a

## CITATIONS

### Cases:

<i>Board of County Commissioners v. Seber</i> , 318 U.S. 705 .....	9
<i>Cherokee Nation v. Hitchcock</i> , 187 U.S. 294 .....	11
<i>Fisher v. District Court</i> , No. 75-5366, decided March 1, 1976 .....	8-9
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 .....	9
<i>Morton v. Mancari</i> , 417 U.S. 535 .....	7, 8
<i>Simmons v. Seelatsee</i> , 384 U.S. 209, affirming 244 F. Supp. 808 .....	9
<i>Sizemore v. Brady</i> , 235 U.S. 441 .....	8, 9
<i>United States v. Jim</i> , 409 U.S. 80 .....	9, 10
<i>Weinberger v. Salfi</i> , 422 U.S. 749 .....	12
<i>Williams v. Johnson</i> , 239 U.S. 414 .....	9
<i>Winton v. Amos</i> , 255 U.S. 373 .....	9

## Constitution, treaties and statutes:

## United States Constitution:

Article I, Section 8, Clause 3 .....	10
Fifth Amendment .....	2, 6, 10
Treaty of St. Mary's (1818), 7 Stat. 188 .....	2, 3, 5
Treaty of St. Mary's Supplement (1829), 7 Stat. 327 .....	3
Treaty of May 6, 1854, 10 Stat. 1048: .....	3, 6, 7
Article 8, 10 Stat. 1050 .....	10
Treaty of July 4, 1866, 14 Stat. 793: .....	3
14 Stat. 796 .....	4
Act of June 22, 1874, 18 Stat. 146, 175 .....	4
Act of April 21, 1904, 33 Stat. 189, 222 .....	12
Act of September 21, 1968, 82 Stat. 861 <i>et seq.</i> , 25 U.S.C. 1181-1186: .....	5, 6, 7
25 U.S.C. 1181 .....	5
Act of October 3, 1972, 86 Stat. 762 <i>et seq.</i> , 25 U.S.C. (Supp. IV) 1291-1297: .....	2, 6, 7, 8, 9
25 U.S.C. (Supp. IV) 1292 .....	6
25 U.S.C. (Supp. IV) 1294 .....	11
25 U.S.C. 788a-788h .....	11
25 U.S.C. 1051-1055 .....	11
25 U.S.C. (and Supp. IV) 1111-1130 .....	11
25 U.S.C. 1221-1227 .....	11
25 U.S.C. (Supp. IV) 1403(b)(5) .....	11

## Miscellaneous:

<i>Annual Report of the Department of the Interior, 1906</i> .....	12
<i>Cohen's Handbook of Federal Indian Law (1942)</i> .....	8

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**JURISDICTIONAL STATEMENT**

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**OPINION BELOW**

The opinion of the three-judge district court (J.S. App. 1a-87a)<sup>1</sup> is not yet reported.

**JURISDICTION**

The judgment of the three-judge district court was entered on December 18, 1975 (J.S. App. 88a-89a). A notice of appeal was filed on January 16, 1976 (App., *infra*). On March 4, 1976, Mr. Justice White extended the time for docketing the appeal to and including April 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

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<sup>1</sup>"J.S. App." references are to the appendix to the Jurisdictional Statement of Appellants Delaware Tribal Business Committee, *et al.*, in No. 75-1301.

### QUESTION PRESENTED

Whether 25 U.S.C. (Supp. IV) 1291-1297, which authorizes the payment of funds to members of two federally-recognized tribes of Delaware Indians pursuant to a judgment of the Indian Claims Commission, denies due process of law under the Fifth Amendment by excluding descendants of Delaware Indians who voluntarily severed their relations from the tribe more than a century ago.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be \* \* \* deprived of \* \* \* property, without due process of law \* \* \* .

The Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, is set forth at J.S. App. 94a-97a.

### STATEMENT

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered. Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New England and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 6a-7a).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 treaty, in which they agreed to give up their temporary residence in

Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a tribal council, to the present day (J.S. App. 7a-8a). The Absentee Delawares constitute a federally-recognized tribe.<sup>2</sup>

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which they ceded most of their lands to the federal government (10 Stat. 1048; J.S. App. 98a-106a). Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by improperly selling the trust lands without a public auction. As a result, the Delawares received far less money from the disposition than they should have obtained (J.S. App. 8a).

Finally, in 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma (14 Stat. 793; J.S. App. 107a-118a). Under the treaty, the diminished reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with

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<sup>2</sup>The Absentee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335.

the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and his *pro rata* portion of the tribal assets (J.S. App. 9a). The treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities" (14 Stat. 796; J.S. App. 114a). Appellees, the so-called "Kansas 'Delawares'," are the descendants of those Indians who elected to sever all relations with the Delaware Tribe in 1866, to receive their proportionate share of the tribal assets, and to remain in Kansas as American citizens (J.S. App. 9a-10a).<sup>3</sup>

By 1867 most of the Delawares had moved to Oklahoma, where they each received a life estate of 160 acres of land on the Cherokee reservation. Although these Indians became members and citizens of the Cherokee Nation, they retained a group identity as Delawares (J.S. App. 10a-11a). Their descendants are the Cherokee Delawares, a federally-recognized tribe.<sup>4</sup>

2. In 1951, members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Delaware Nation to challenge as inadequate the

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<sup>3</sup>A total of 21 adults and 49 minors chose to remain in Kansas. The minors did not formally become citizens of the United States until 1874, when Congress appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe and directed the Secretary of the Interior to issue fee simple title to lands allocated to them in the 1866 treaty (18 Stat. 146, 175; J.S. App. 12a).

<sup>4</sup>The Cherokee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335.

compensation received under the 1818 treaty. The Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded \$1,627,244.64 to the Delaware Nation (J.S. App. 12a). By Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, Congress appropriated funds to satisfy this judgment and ordered the Secretary of the Interior to distribute the funds to the following (25 U.S.C. 1181; J.S. App. 92a):

- (a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906"; or
- (b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior"; or
- (c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through the third, or "catchall," provision) all were eligible to participate in this distribution.

Subsequently, the Absentee and Cherokee Delawares brought a second suit in the Indian Claims Commission

for an accounting under the 1854 treaty relating to the sale of the "trust lands." The Commission concluded that these lands had not been sold at public auction, contrary to the terms of the treaty, and awarded the Delawares \$9,168,171.13, including interest from 1857. In the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, however, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186: ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary, while the remaining ninety percent was to be divided among individual tribal members in categories (a) and (b) above. Thus, since the "catchall" provision (c) was not included in the distribution statute, the Kansas "Delawares" did not share in the second award (J.S. App. 15a-17a).

3. Appellees, representatives of a class of approximately 600 descendants of the Kansas "Delawares," instituted this action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297. Specifically, appellees alleged that 25 U.S.C. (Supp. IV) 1292 violated principles of equal protection embodied in the Due Process Clause of the Fifth Amendment by excluding them from sharing in the second Indian Claims Commission award and that their exclusion amounted to a taking of property without just compensation. They also challenged the inclusion of the Cherokee Delawares in the distribution provisions of 25 U.S.C. 1181-1186 and the inclusion of the Cherokee and Absentee Delawares in the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297.

A three-judge district court, with one judge dissenting, agreed with appellees that 25 U.S.C. (Supp. IV) 1291-1297 violated due process by arbitrarily deleting the Kansas "Delawares," whose ancestors were among the Indians injured by the government's breach of the 1854 treaty, from the class of persons entitled to share in the second distribution. Although the court majority conceded that the challenged statute involved no "suspect classification" or "fundamental interest," it concluded that the Kansas "Delawares" exclusion from the distribution provisions had no rational basis (J.S. App. 29a, 35a-51a). Therefore, the court declared the statute unconstitutional and enjoined the Secretary from distributing the funds appropriated thereunder. The court rejected the attack on 25 U.S.C. 1181-1186 and denied all other relief requested by the appellees (J.S. App. 64a).<sup>5</sup>

#### THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the scope of congressional power over Indian affairs and the proper application of the Due Process Clause to legislation affecting the distribution of tribal property. In our view, the district court erroneously concluded that Congress is constitutionally prohibited from favoring members of federally-recognized Indian tribes over descendants of Indians who long ago severed their relations with the tribe. This decision is inconsistent with the Court's holding in *Morton v. Mancari*, 417 U.S. 535, that Congress may legitimately favor tribal Indians and that the determination of who are tribal Indians is not fixed by lines of descendency or race; it conflicts with the repeated holdings of this Court emphasizing the broad latitude Congress has in dealing with Indian affairs and Indian tribal property; and it casts

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<sup>5</sup>The Kansas "Delawares" have sought review of this portion of the district court's judgment in No. 75-1328.

doubt upon the constitutionality of other statutes specifying the manner of distribution of tribal assets.<sup>6</sup>

1. The district court concluded that 25 U.S.C. (Supp. IV) 1291-1297 violated the Due Process Clause because it "rests on no foundation rationally related to a legitimate governmental interest \* \* \*" (J.S. App. 50a). Congress, however, did not act irrationally in excluding the Kansas "Delawares" from the distribution authorized by the statute. Unlike the Cherokee and Absentee Delawares, who continue to the present day to live on Indian reservations as members of an Indian tribe, the Kansas "Delawares" are American citizens who are scattered throughout the country, who are in no sense an Indian tribe, and whose ancestors took their proportionate share of the Delaware tribal assets and renounced tribal membership more than a century ago.

Congress' determination to favor tribal Indians in the allocation of tribal funds was therefore not arbitrary or capricious. Indeed, a similar legislative decision to grant hiring preferences in the Bureau of Indian Affairs to tribal Indians was recently upheld in *Morton v. Mancari*, *supra*. This Court acknowledged in *Mancari* (417 U.S. at 553, n. 24) that the preference applied only to members of "federally recognized" tribes, rather than to individuals racially classifiable as Indians, but concluded (417 U.S. at 552) that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations." See also *Fisher v.*

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<sup>6</sup>Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, so long as those persons have a tribal relationship. See *Sizemore v. Brady*, 235 U.S. 441, 447; Cohen's *Handbook of Federal Indian Law* 98-99 (1942).

*District Court*, No. 75-5366, decided March 1, 1976, slip op. 8-9.

This crucial distinction between tribal and non-tribal Indians, and the federal government's historic relationship to each, is sufficient to justify the difference in treatment accorded the Kansas "Delawares" by 25 U.S.C. (Supp. IV) 1291-1297, especially in view of the repeated pronouncements by this Court of the broad authority of Congress to distribute tribal property in the manner it views as most beneficial to the affected Indians. See, e.g., *United States v. Jim*, 409 U.S. 80; *Simmons v. Seelatsee*, 384 U.S. 209, affirming, 244 F. Supp. 808 (E.D. Wash.); *Board of County Commissioners v. Seber*, 318 U.S. 705, 718; *Winton v. Amos*, 255 U.S. 373, 391; *Williams v. Johnson*, 239 U.S. 414, 420; *Sizemore v. Brady*, 235 U.S. 441, 449; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565.

In *Sizemore v. Brady*, *supra*, for example, the Court upheld the power of Congress to amend acts granting allotments of land and money to individual Indians, stating (235 U.S. at 449):

The lands and funds to which [the allotment statute] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to relatives of deceased members the lands and money to which the latter would be entitled, if living.

Similarly, in *United States v. Jim, supra*, the Court recently reaffirmed this broad congressional power in upholding a statute enlarging the class of persons within the Navajo Tribe of Indians entitled to share in royalties from minerals found on the reservation (409 U.S. at 83):

Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the \* \* \* royalties \* \* \* in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the [reservation] \* \* \*, no violation of the Fifth Amendment was effected by the \* \* \* legislation.

Indeed, Congress was empowered to act here not only under its constitutional authority "[t]o regulate Commerce \* \* \* with the Indian Tribes" (Article I, Section 8, Clause 3), but also under Article 8 of the 1854 treaty, which provided (10 Stat. 1050; J.S. App. 102a):

Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said [trust] lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

The distribution statute enacted by Congress is within this wide authority, has a rational basis that is readily apparent, and hence does not violate the principles of equal protection that inhere in the Due Process Clause of the Fifth Amendment.

2. By rejecting the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members as reflected on the 1906 and 1940 tribal rolls,

and by interpreting the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to *all* lineal descendants of members of the tribe at the time of the alleged wrong, the decision of the district court calls into question the validity of similar federal legislation and imposes a severe administrative burden upon the Secretary.

Several other past and present distribution statutes have authorized *per capita* payments to Indians who are either on, or descended from persons on, specified tribal rolls, without providing express "catchall" coverage for all descendants of members of the injured tribe on the exact date of injury. See, e.g., 25 U.S.C. 788a-788h (Creeks); 25 U.S.C. 1051-1055 (Tillamooks); 25 U.S.C. (and Supp. IV) 1111-1130 (Miamis); 25 U.S.C. 1221-1227 (Weas, Piankashaws, Peorias and Kaskaskias). Thus, the legality of thousands of Indian distributions involving hundreds of millions of dollars may be in doubt. The court's decision may also prevent the congressional practice of distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs (see, e.g., 25 U.S.C. (Supp. IV) 1403(b)(5)),<sup>7</sup> despite the fact that the award redresses a wrong to the *tribe* rather than to individual Indians (see *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307).

Moreover, compliance with the district court's judgment would require the development of new tribal rolls, rather

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<sup>7</sup>25 U.S.C. (Supp. IV) 1294 contains a similar provision, allocating ten percent of the judgment funds for tribal use. In view of its decision striking the entire statute, the district court did not specifically address the validity of that provision (J.S. App. 17a-18a, n. 20).

than the use of existing tribal rolls, whenever an Indian Claims Commission award is to be distributed—a task that Judge Daugherty, dissenting below, correctly termed “horrendous” (J.S. App. 86a).<sup>8</sup> Congress could rationally determine not to place that enormous administrative burden on the Secretary, at costs frequently not justified by the amount of the *per capita* distribution, particularly when the injury may have occurred at different times, when separate groups of Indians may therefore be eligible to share in the award, and when complex descendancy determinations; involving events more than a century old, would be necessary. See *Weinberger v. Salfi*, 422 U.S. 749, 777.

### CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

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EDWARD J. SHAWAKER,  
*Attorneys.*

APRIL 1976.

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<sup>8</sup>The 1906 roll involved in the present case would have included the Kansas “Delawares” except for a determination at that time that Indians who had severed their tribal relations could not participate in a distribution of funds to the Cherokee Delaware Tribe under the Act of April 21, 1904, 33 Stat. 189, 222, which appropriated \$150,000 in settlement of various Delaware claims against the United States. See *Annual Report of the Department of the Interior, 1906*, p. 223.

**APPENDIX**

**IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA**

WANDA JUNE WEEKS,	)	
Plaintiff	)	CIVIL NO. 73-586-E
vs.	)	
THOMAS J. KLEPPE, SECRE-	)	
TARY OF THE INTERIOR OF	)	
THE UNITED STATES OF	)	
AMERICA AND TRUSTEE FOR	)	
THE DELAWARE INDIAN PEOP-	)	
LE; THE DELAWARE TRIBAL	)	
BUSINESS COMMITTEE; THE	)	
ABSENTEE DELAWARE TRIBE	)	
OF OKLAHOMA BUSINESS	)	
COMMITTEE; BRUCE MILLER	)	
TOWNSEND; NATHAN H.	)	
YOUNG; MARY TOWNSEND CROW;	)	
HENRY A SECONDINE; Y. A.	)	
SCOTT; ARTHUR L. THOMAS;	)	
ALENE MARTINEX; MYRTLE	)	
HOLDER; TOMMY HOLDER; LAW-	)	
RENCE SNAKE; CHARLES TAY-	)	
LOR; CLIO CHURCH; MABEL	)	
MURRAY; AND GRACE SPOON-	)	
ER ROSE.	)	
Defendants	)	
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH	)	
RATTLER, on their own behalf	)	
and on behalf of all those similarly	)	
situated,	)	
Plaintiffs	)	

VS.	)	
THOMAS J. KLEPPE, individu-	)	CIVIL NO. 74-368-D
ally and in his capacity as Secretary	)	
of the Interior of the United States	)	
of America,	)	
	)	
Defendant,	)	
THE DELAWARE TRIBE OF	)	
INDIANS, THE ABSENTEE DEL-	)	
AWARE CLASS on behalf of the	)	
DELAWARE TRIBE OF WESTERN	)	
OKLAHOMA,	)	
	)	
Intervenors	)	

### NOTICE OF APPEAL

Notice is hereby given that the defendants, Stanley K. Hathaway (now Thomas J. Kleppe), individually and in his capacity as Secretary of the Interior of the United States of America, hereby appeals to the United States Supreme Court from the Order and Judgment, entered in the Three-Judge District Court in this action on December 18, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

DAVID L. RUSSELL  
United States Attorney

/s/ Givens L. Adams  
GIVENS L. ADAMS  
Assistant U.S. Attorney

Attorney for the said Defendant,  
Secretary of the Interior of  
the United States

Filed: January 16, 1976.